

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1319

To Be Argued By:
HELENA PICHEL SOLLEDER

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77-1319
1320

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

77-1320

Appellee

v.

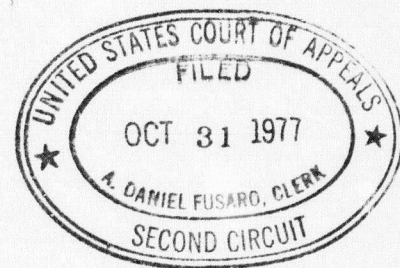
NANCY REED and MORRIS GOLDSMITH,
a/k/a MARLOWE,

Appellants

Brief

APPELLANT GOLDSMITH'S
MEMORANDUM OF LAW

B
R/S



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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v.

NANCY REED and MORRIS GOLDSMITH
a/k/a MARLOWE

Appellants

APPELLANT GOLDSMITH'S MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered on July 20, 1977 by the Honorable Frederick Van Pelt Bryan on a jury verdict of guilty of counts 1 and 2 in violation of Title 21, U.S.C. Sections 842(a)(1) and 841(b)(1)(a). Counts 1 and 2 charged appellant and Reed with conspiracy to sell and distribute and a sale of heroin on September 10, 1976 to an undercover agent.

The jury convicted appellants on these counts, but were unable to agree on counts 3 and 4 - which charged sales on September 23 and 30, 1976 - and as to these counts a mistrial was declared.

Appellant Goldsmith was sentenced to a term of 4 years on counts 1 and 2 to run concurrently with each other and Special Parole of three years; Reed received a sentence of 6 years to run concurrently; sentence was suspended and she was placed on probation for 5 years. At the sentencing appellant

and the Government took exception to the culpability index of the Probation Report as to Reed (App. H). The exception was that appellant Reed was the more culpable of the two. The Probation Report stated that Goldsmith was far less astute than she, that he was immature and not hostile to authority (Tr. 7/20/77 - Tr. 734-736). Appellant's role as compared to that of Reed was minimal. The indictment charges seven overt acts, only one of which charged appellant with a delivery jointly with Reed; and two with having had conversations, while Reed was charged with three deliveries and the receipt of money, (App. B).

STATEMENT OF ISSUES

Whether the conviction against Goldsmith should be reversed because:

(1) The statement made by Goldsmith to the United States Attorney (App. G-2) was obtained in violation of his Fourth and Fifth Amendment rights;

(2) The Court failed to instruct the jury as to the voluntariness of appellant's confession as mandated by Section 3501(a), 18 U.S.C.;

(3) The Court abused its discretion in denying suppression of appellant's prior conviction of ^{over} 9 years and thus deprived him of his constitutional right to testify in his own defense.

STATEMENT OF THE CASE

On this appeal appellant adopts the statement of facts set forth in appellant Reed's memorandum insofar as applicable to him, as well as her legal argument on the violation of appellant's Fourth Amendment rights in that when they were arrested the DEA agents had no warrant for their arrest. Since the evidence seized from Reed's apartment at the time of arrest was not admitted against Goldsmith, his argument is limited to the confession subsequently obtained from him on the ground that it was tainted by the unlawful arrest.

It was charged that defendants had sold three separate packages of heroin to undercover agent Hammonds. It was Goldsmith's contention that he was no more than a messenger for Reed, who was the prime mover in the transactions, who had negotiated the sales and who had engaged in further discussions after September 29th, looking toward greater deals. In addition the proof showed that Reed after the first sale of September 10, 1976 attempted or planned to get rid of Goldsmith and "go it alone", stating to Hammonds that too many people confused things, and that Goldsmith had done so by understating the purchase price of the first sale. (Tr. 50-51). There was no evidence that Goldsmith made any money out of the September 10, 1976 sale and the only time he was involved in a negotiation he made a mistake as to the price. (Tr. 49). There was evidence received only against Reed consisting of address books containing names of drug dealers. (Tr. 99-188; 6/7). There were also telephone conversations between her and Hammonds. (App. E, F).

THE SUPPRESSION HEARING

The Government offered in evidence Goldsmith's confession made to Assistant U.S. Attorney Sussman on the day of his arrest (App. G-2).

This confession had been preceded by an oral statement made to Agents Bell, Tuerack and Hammonds, following his arrest, at DEA headquarters. Initially defense counsel had moved to suppress only the signed statement but since on the suppression hearing the government elicited testimony from agents relating to the statements made to them by Goldsmith, she moved to include these in her motion. This as well as suppression was denied by the Court without opinion. (Tr. 188).

The facts preceding the confession of appellant are as follows: On February 23, 1976 at 7:45 A.M. agents Tuerack and Jordison entered Reed's apartment, went into the bedroom and woke appellant up and told him he was under arrest. Agent Jordison read to defendant BND Form 13-A containing the Miranda warnings; immediately the agents and defendants drove down to DEA headquarters.

At first appellant denied any involvement in drugs, but then at the DEA office he made a statement to the agents that he had transacted narcotics after the informant had introduced him to Hammonds the undercover agent. At the time appellant was on parole from a sentence in the state court and had a number of years to complete. There was discussion about the possibility of his being useful to the agents to observe narcotics transactions and introduce sellers. Although agent

Tuerack testified that it was only after appellant had admitted the three sales in question and his source that he said he would help him with his parole status, there was discussion concerning appellant's release prior to his making the statement. It was clear from the testimony that from the inception defendant was concerned about his parole status and the loss of his job; that he was looking to the agents to help him with his parole officer or board if he was to cooperate with them. Agent Tuerack testified that he did not know how the parole worked, and that none of the agents requested parole for defendant. (Tr. 114, 117, 139, 144-145, 160). Although the agents testified that they made no promises to appellant about having him released, it was clear that if they were to use him on the street, observing narcotic transactions, he would have to be released. Although BND Form 13^A which the agents read to appellant bore this warning on its face "If a person waives rights have him sign BND 13 statement or rights" - it is uncontradicted that appellant never signed any such form. (Tr. 138-139). The defendant testified that he relied on the statements made by the agents that if he cooperated and assisted them they would attempt to help him not be violated and be released; that all three agents said that if he cooperated, he would make bail and would not go back to state prison. (Tr. 178-181). At that time defendant had served

8 years and 4 months out of a possible sentence of 29 years, had been out on parole since 9/2/74 and said he would do anything to stay out of prison. He also testified that he had requested a lawyer prior to making any statements and that he was concerned lest his employer find out he had been arrested, that he wanted to telephone him, but that the agents told him that if he was cooperating with them, it was none of the employer's business, especially if he was cooperating with them. This to appellant meant but one thing - that he was going to be out on the street. (Tr. 115, 134, 178-181, 186-187).

The testimony at the trial with respect to the written statement made to Assistant U.S. Attorney Sussman was that after giving his pedigree, there was a lengthy discussion concerning defendant's bail status, after which defendant admitted the sales and told the agents and the government attorney where he had obtained some of the drugs. That appellant started talking about narcotic transactions and then stopped and asked about his bail, that this discussion went on for some time, and that the Assistant U.S. Attorney said he would recommend to the Magistrate a reasonable amount of bail, that defendant kept asking what would happen to him and that he admitted the three sales. The statement which was introduced by the Government in evidence bore the notation "an Extended Discussion of defendant's bail status took place." (Tr. 386).

Counsel unsuccessfully objected to its receipt in evidence as being in contravention of defendant's rights, as well as on the ground that it was unreliable, incomplete and inaccurate because of what had been left out and because she could not inform the jury of the circumstances surrounding its making since to do so would have disclosed his prior conviction (Tr. 382-391).

THE "LUCK" HEARING

Prior to the trial the Court held a "Luck" hearing. Appellant's conviction, 9 years and 7 months old, was for Felonious Possession of a Dangerous Weapon, Grand Larceny First Degree; Robbery Third Degree and Assault First Degree. Judge Bryan ruled that he would permit the government to inquire into these if appellant were to take the stand (Tr. 20-22).

THE CHARGE OF THE COURT

The Court charged the jury the usual boiler plate as to being the judges of the facts and of credibility. He did not charge the jury on the statement per se of the appellant but rather in the context that it was to be considered only as to the maker and not as to the other and that the United States contended that after their arrest the defendants admitted engaging in transactions with Hammonds. (Tr. 632-634; 649, 661). After the charge counsel for Goldsmith requested a charge on the voluntariness of the statements which the Court refused as follows:

"I passed on that at a separate hearing. That is not a question for now. I'm going to deny your request." (Tr. 677)

POINT I

THE APPELLANT'S CONFESSION SHOULD HAVE
BEEN SUPPRESSED AS OBTAINED IN VIOLATION
OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS

Counsel adopts the legal argument made by counsel for Reed in support of the contention that the confession obtained after an illegal arrest must be suppressed as tainted, under the Fourth Amendment.

With respect to Goldsmith, the taint which attached from his illegal arrest was not removed.

The first confession to the agents was made within a short time after the arrest. The arrest was at approximately 7:45 A.M. and they arrived at DEA headquarters within 45 minutes. His second confession to Assistant U.S. Attorney Sussman was made at 3:30 P.M. in the office of the U.S. Attorney in the presence of the agents who had escorted him down.

Since the second confession occurred within a few hours and in the presence of the agents, while in custody, it was but the natural consequence of the first confession, if not a continuation. Having started to bare his soul to the agents the appellant continued to do so to the Assistant U.S. Attorney.

The illegality flowing from the warrantless arrest adhered to the first statement, it was not attenuated by a proper waiver - appellant did not sign the waiver form - the statement was not volunteered and was made under desperate circumstances - a fear of further incarceration for parole violation. It was made under the belief that if he cooperated

with the agents they could help him stay out of jail after having done a long stretch. It was the result of "surprise, fright and confusion" and as such continued to be illegal. Brown v. Illinois 422 U.S. 590 (1975).

The second confession being the result of the first, it too was tainted by the illegal arrest.

The "totality of the circumstances" (Boulder v. Holman, 394 U.S. 478 (1969)) casts serious doubt on the voluntariness of the statement made by the defendant for Fifth Amendment purposes.

First there was the fact that appellant was concerned about his job; the terrible fear that his parole would be revoked; the fact that he did not initiate the conversations, and the discussions with the agents about using him on the street - which could mean but one thing - that he would not be charged with violation of parole and that his bail would not be prohibitive, the last of which was in fact promised by the Assistant U.S. Attorney. It appears that no agent or Assistant U.S. Attorney made an effort to speak to his parole officer.

In U.S. v. Arcediano, 371 F. Supp. 457, D.C.N.J. 1974, the defendant raised a similar claim of involuntariness of his confession on the ground that the agents promised that they would try to get defendant in federal custody instead of state custody. The Court denied his claim finding that the defendant

had volunteered the information, and that he initially sought the agents out and continued to press them to talk to him. Moreover, there the agents did keep their promise to place him in federal custody. There too, the Court found that the defendant had signed a waiver of rights form before confessing and that his statement was full and complete. In U.S. v. Dye, 508 F. 2d 1226, cert. den. 95 Sup. Ct. 1395 (1975), the Court rejected a claim by defendant that the agents had threatened to revoke his wife's probation if he did not confess on a finding that no such threat had ever been made.

Here it is admitted that the agents did discuss the possibility of using defendant on the street - which meant that he would not be violated.

The confession should be suppressed as having been obtained in violation of defendant's constitutional rights because it was the product of an illegal arrest, which taint was not removed, and because it was given in reliance on a representation or belief induced by the agents and the Assistant U.S. Attorney that defendant might be released, when there was no possibility of this occurring.

Moreover, the circumstances under which the statement was given - relating to defendant's bail and parole status - could not be brought to the attention of the jury. This made consideration of its validity as a whole impossible and for this reason too, it should be suppressed, as an unreliable and incomplete admission.

POINT II

THE COURT ABUSED ITS DISCRETION IN FAILING TO SUPPRESS EVIDENCE OF APPELLANT'S PRIOR CONVICTION

The decision of the Court that the Government might inquire into appellant's more than nine-year-old conviction deprived him of the opportunity to testify in his own behalf and constituted a denial of due process.

Although Rule 609 speaks of the date on which defendant's sentence terminates or the date of conviction whichever is later, counsel has been unable to find one case where the former date was invoked by a Court to deprive a defendant of his right to testify.

In U.S. v. Jackson, 405 F. Supp. 938 (1975 E.D.N.Y.) Judge Weinstein stated that the purpose of the rule was for the protection of the defendant rather than for the government and to encourage a defendant to take the stand and explain his conduct. The Court in a violent bank robbery case excluded a recent state court conviction for assault because of the possible impact on the jury.

Here the problem is not prejudice from a similar type of crime, but rather the fact that the prior crime being of an assaultive and violent nature has nothing to do with veracity. U.S. v. Millings, 535 F. 2d 121 (D.C. Cir. 1976); Gov't. of V.I., v. Toto, 529 F. 2d 278 (3rd Cir., 1976). In U.S. v. Puco, 453 F. 2d 539 (2nd Cir., 1971) this Court barred evidence of a 21 year-old conviction for a violent crime as being too old to

have any probative value on credibility, as well as on the ground that its violent nature would not reflect on veracity. The decision, of course, is within the discretion of the Court. Luck v. U.S., 348 F. 2d 763.

In U.S. v. Mahone, 537 F. 2d 922 (2nd Cir., 1976) this Court set forth the explicit findings which the trial judge should make in order to enable an appellate court to see if he has validly invoked his discretion under Rule 609. The elements to be considered and proved by the government are as follows: the impeachment value of the prior crime; the point in time of the conviction; the similarity between the past and the present crime; the importance of the defendant's testimony and the centrality of the credibility issue, citing Gordon v. U.S., 127 U.S. App. D.C. 343, 383 F. 2d 936 (1967). Here there was no such proof adduced by the government and no findings made by the Court. Certainly, the impeachment value of a crime of violence (during a larceny) in the trial of a crime charging sales of drugs is an open question. U.S. v. Aloï, 511 F. 2d 585 (2nd Cir. 1975); U.S. v. DeAngelis, 490 F. 2d 1004 (2nd Cir.) cert. den. 416 U.S. 956.

Given the subsidiary role played by appellant in the instant transactions as compared to appellant Reed, who is to say that had he testified in his own defense, the jury might not have considered him a victim of a clever woman who was in the process of getting rid of him. Moreover, appellant was deprived of the opportunity to present to the jury the issue of the voluntariness of his confession.

The conviction was ancient - it fell short by 3 months of the 10 year bar of the Rule 609 commonly employed by the Court. It was an abuse of discretion to deprive appellant of his right to testify in his own defense.

POINT III

THE COURT ERRED IN NOT SUBMITTING TO THE JURY THE QUESTION OF THE VOLUNTARINESS OF APPELLANT'S CONFESSION.

Section 3501(a), Title 18 U.S.C. says that the court "shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

The failure of the trial court to specifically instruct the jury on the question of voluntariness and the defendant's contentions with respect to it, mandates a new trial.

The issue was presented on the trial, appellant's counsel cross-examined agent Tuerack as to the circumstances surrounding the making of the confession. Counsel requested a specific instruction of the Court, but even if she had not, the Court was under a statutory duty to give the instruction. It is the duty of the jury to determine fairness as well as reliability of the statement even in the face of a contention by defendant that he has not made the statement at all.

U.S. v. Barry, 518 F. 2d 342 (2nd Cir., 1975). The jury must play a part on the issue of duress and inducement; by the Court's failure to so instruct it, it was foreclosed from this consideration and a general charge that the jury is the judge of the facts and their credibility is not sufficient

to satisfy the statute. U.S. v. Barry, supra,

In U.S. v. Lucchetti, 533 F. 2d 28 2nd Cir., cert. den. 429 U.S. 489 (1976) this Court held it to be error for the trial court not to have charged the jury on the voluntariness of the confession. But it refused to reverse the conviction for two reasons: one was that the defendant had volunteered the confession after signing four waiver forms, the other, was that the defendant had failed to present to the jury evidence from which it might infer that the statement was anything but voluntary.

This is not the case here - to the extent permitted in view of defendant's inability to testify he did present to the jury the circumstances (circumscribed as they necessarily were) surrounding the signing of the statement and the absence of any written waiver. The inability of appellant to make a full record because of the nature of the discussions and because of the Court's ruling under Rule 609 should not have the effect of penalizing him.

While any one of the appellant's arguments taken alone might not have been sufficient to raise a doubt of his guilt in the jury's mind - the combination of these errors urged may well have tipped the scale in favor of guilt.

CONCLUSION:

The conviction must be reversed and the case remanded for a new trial because:

- (a) the defendant's confession should have been suppressed;
- (b) defendant should have been enabled to testify;
- (c) the jury should have been given the opportunity to pass on the voluntariness of appellant's confession.

Respectfully submitted,

HELENA PICHEL SOLLEDER
Counsel for Appellant GOLDSMITH

AFFIRMATION OF SERVICE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee

-against-

77 Cr. 1319, 1320

NANCY REED & MORRIS GOLDSMITH
AKA MARLOWE,

Appellants.
-----x

HELENA PICHEL SOLLEDER, attorney for appellant, Foldsmith,
affirms under penalty of perjury:

On October ³¹, 1977 I served a copy of the appellant's brief and
joint appendix on Robert Mazur, Assistant United States Attorney, attorney
for appellee, and on Robert S. Markfield, Esq., Attorney for appellant
Reed, by mailing copies of the same at the following address: One St. Andrew's
Plaza, New York City and 509 Madison Avenue, New York City, those being
the addresses of the above attorneys, designated for service of : papers.

Dated, New York, , October 31, 1977.

Helena Pichel Solleder

